



January 21, 2016

U.S. Environmental Protection Agency  
Attention Docket ID No. EPA-HQ-OAR-2015-0199  
EPA Docket Center, U.S. EPA, Mailcode: 28221T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, Proposed Rule, Docket ID No. EPA-HQ-OAR-2015-0199, 80 Fed. Reg. 64,966 (Oct. 23, 2015)

Dear Sir or Madam:

The National Association of Manufacturers, U.S. Chamber of Commerce, Aluminum Association, American Chemistry Council, American Forest and Paper Association, American Fuel and Petrochemical Manufacturers, American Petroleum Institute, American Wood Council, Brick Industry Association, Corn Refiners Association, Council of Industrial Boiler Owners, Electricity Consumers Resource Council, and The Fertilizer Institute (collectively, “the Associations”)<sup>1</sup> appreciate the opportunity to submit the following comments on the Environmental Protection Agency’s (“EPA’s”) proposed Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations Docket ID No. EPA-HQ-OAR-2015-0199, 80 Fed. Reg. 64,966 (Oct. 23, 2015) (proposed FIP).

The Associations represent the nation’s leading energy and manufacturing sectors that form the backbone of the nation’s industrial ability to grow our economy and provide jobs in an environmentally sustainable and energy efficient manner. Significantly, the Associations both represent companies that generate electricity and are directly regulated by the Clean Power Plan and companies that are reliant upon affordable and reliable energy to produce products critical to the success and growth of the American economy. Many of the Associations are among more than a hundred states, trade associations, and private petitioners challenging the legality of the

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<sup>1</sup> A description of each Association is included in Appendix A.

Clean Power Plan in the D.C. Circuit, and believe that the Clean Power Plan is unlawful and should be set aside in its entirety. To the extent the courts uphold the legality of any aspect of the Clean Power Plan, the Associations have a strong interest in any proposals to implement the Clean Power Plan, including EPA's proposed FIP and model trading rules. In particular, the Associations believe any such plans must incorporate flexible, least-cost compliance options that minimize the impact of emissions reductions on electricity generators and manufacturing sectors.

As an initial matter, EPA must ensure that implementation plans are consistent with the requirements of the Clean Air Act. Like the Clean Power Plan itself, the Associations believe that EPA or the states will exceed their authority under the Clean Air Act by imposing emission reduction obligations beyond the regulated source category. Any such obligations on companies beyond the regulated source are unlawful.

Second, it is critical that EPA remain focused on promoting and protecting the primary role that states—not the federal government—play in implementing emissions guidelines under Section 111(d) of the Clean Air Act. While guidance and technical assistance to assist states can be helpful in appropriate circumstances, EPA must ensure that it is not unduly influencing state decisions or restricting state flexibility to identify and incorporate the emission reduction opportunities that are best suited to each state.

Third, even as EPA prepares its own implementation plans that might serve as a fall-back in the event that a state plan is not satisfactory, EPA must likewise take a flexible and open-minded approach that ensures that any impacts on the electricity generators and companies dependent on affordable and reliable electricity is minimized. In particular, it is critical that EPA incorporate all of the flexibility options included in the final Clean Power Plan into any FIP, provided that decisions to commit to take actions to reduce emissions beyond affected electricity generating units ("EGUs") are voluntary. By excluding certain emission reduction alternatives from participating in the mass-based and rate-based plans as well as other flexibility tools such as a reliability safety valve, the proposed FIP and model trading rules are unduly restrictive and will ultimately frustrate the Clean Power Plan's emission reduction goals. For the same reason, EPA must adjust its treatment of combined heat and power units to more fully recognize their emission reduction benefits.

Finally, EPA must refrain from prejudging components of a federal implementation plan and should instead defer final decisions until a FIP is necessary so that EPA can first gather as much information as possible before making an informed, state-specific decision. In the interim, EPA should issue guidance to the states to clarify that it will approve and endorse state plans that include broader flexibility options that go beyond what is included in the narrowly construed proposed FIP. EPA should keep flexibility at the forefront in developing further guidance and direction to states that promote broad inclusivity of compliance options and offer states the best opportunities to design implementation plans that can reduce emissions while limiting costs and other impacts on affected EGUs and electricity consumers.

## **I. EPA Cannot Mandate Beyond-the-Source Compliance Options**

At the outset, the Associations reiterate that EPA has exceeded its legal authority under the Clean Air Act by imposing carbon dioxide ("CO<sub>2</sub>") emission targets that are based on

beyond-the-source emissions reductions that cannot be achieved by the coal-fired or natural gas-fired EGUs that are the subject of regulation under the Clean Air Act and the Clean Power Plan. Further, EPA has promulgated a regulatory timeframe that could have the effect of forcing implementation of the Clean Power Plan before the courts can fully resolve whether EPA has exceeded its legal authority. Nothing in these comments is intended to waive any legal argument that the Associations have made or may make in litigation regarding the legality of the Clean Power Plan, and the Associations hereby incorporate by reference all arguments made in their comments on the proposed Clean Power Plan and in their briefs in litigation over the Clean Power Plan, including, without limitation, their motion for stay and reply in support of their motion for stay. In particular, EPA has exceeded its authority by looking beyond the emission controls that can be implemented at the source by affected EGUs and instead regulating the entire electricity system when evaluating the potential for emissions reductions from existing sources. This is inconsistent with both the plain meaning of the Clean Air Act and with existing case law interpreting Section 111.

First, the Clean Air Act authorizes EPA and the states to establish “standards of performance *for any existing source*.” 42 U.S.C. § 7411(d). A “source” is defined as “any building, structure, facility, or installation which emits or may emit any air pollutant.” *Id.* § 7411(a)(3). EPA cannot expand the scope of Section 111(d) by asserting the authority to regulate anything that reduces emissions from the electricity sector on the whole. Thus, EPA cannot redefine the “best system of emissions reductions” to include the broader electricity generating system. Indeed, D.C. Circuit case law confirms that EPA cannot interpret Section 111 in a manner that allows aggregation of emissions from multiple sources. *See ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978). Further, because Section 111(d) is intended to regulate existing *sources*, EPA cannot shift its regulatory focus by basing emissions reduction mandates on actions that *owners and operators* can take at *other locations* to reduce net greenhouse gas (“GHG”) emissions. Congress addressed owners and operators in other provisions of Section 111, *see* 42 U.S.C. § 7411(e), not in Section 111(d), and EPA cannot redefine “source” to broadly include owners and operators as a means of regulating beyond the source. Further, EPA’s attempt to regulate beyond the source under Section 111(d) is flatly inconsistent with EPA’s regulations of new sources in the same source category under Section 111(b).<sup>2</sup> There is simply no basis for EPA to adopt a broader, more expansive, and inconsistent definition of the same terms for existing sources than it does for new sources.

Thus, as explained in more detail in the Associations’ other responses to EPA’s Clean Power Plan, any attempt to regulate beyond the source for existing fossil fuel-fired EGUs is unlawful, and EPA cannot incorporate such beyond-the-source requirements as mandatory measures in calculating emission reduction requirements or in an implementation plan. To the extent that such measures are necessary to achieve EPA’s emissions reduction goals, they are unlawful. Thus, EPA must avoid including provisions in any state-specific FIP that have the effect of requiring beyond-the-source emissions reductions for compliance. For the same reason, EPA must give states full flexibility in preparing their own implementation plans and cannot make beyond-the-source regulation a mandatory component of state implementation plans.

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<sup>2</sup> In addition, in comments on the proposed Clean Power Plan, the Associations noted that new sources regulated under Section 111(b) (including modified and reconstructed sources) cannot also be regulated under Section 111(d).

Again, to the extent that such beyond-the-source regulations would be necessary to meet EPA's emission reduction goals, it is simply an indication that EPA has exceeded its legal authority in setting those emission reduction targets.

## **II. EPA Must Maximize Flexibility for Mass- and Rate-Based Implementation Plans by Reconciling the FIP and Model Rule Options with the Final Clean Power Plan**

Should EPA proceed to make decisions on whether to approve state plans, and absent court intervention in the interim, it is essential that EPA maximize flexibility options for states and ensure that states and affected EGUs can meet EPA's emissions reduction goals in the most efficient and least-cost manner. Thus, EPA must allow for broadly inclusive implementation plans and model rules that ensure any incentives to participate in Clean Power Plan compliance programs are administered equally for all CO<sub>2</sub> emission reducing technologies and all sources of energy that can contribute to the achievement of EPA's emission reduction requirements. Arbitrarily excluding otherwise viable emission reduction technologies will needlessly limit compliance options and send mixed messages to states, particularly when EPA recognized in the final Clean Power Plan the benefits of certain technologies and emission sources that it inexplicably then proposes to exclude as compliance options in the proposed FIP. Additionally, it will create a disincentive for the development of any new technologies that might further contribute to CO<sub>2</sub> reductions. Further, it is essential that EPA adopt uniformly inclusive criteria for both the mass-based and rate-based plans. Without such uniformity, EPA may inadvertently create a bias for states to choose one plan over the other due to differences in the available control options.

Throughout the Clean Power Plan, EPA emphasizes the flexibility that states have in designing implementation plans to achieve EPA's aggressive emission reduction goals. In particular, EPA emphasizes that there are a number of CO<sub>2</sub> reducing technologies and sources of energy that were not included in EPA's best system of emission reduction ("BSER") analysis, but could still be used to achieve EPA's emission reduction goals. EPA specifically references demand-side energy efficiency, new or uprated nuclear energy, offshore wind, distributed solar, fuel cells, biomass energy, combined heat and power ("CHP"), waste heat power, and reductions in transmission and distribution line losses as additional means of reducing CO<sub>2</sub> emissions. 80 Fed. Reg. at 64,756-58. The Associations agree with EPA that states and affected EGUs should be given maximum flexibility to achieve EPA's emission reduction goals and that decisions to commit to take actions to reduce emissions beyond affected EGUs should be voluntary. Providing such flexibility will allow both states and affected EGUs to evaluate the many different compliance options and to determine the mix of CO<sub>2</sub> reducing technologies and sources of energy that can be used to efficiently achieve EPA's emission reduction goals within their respective state or energy portfolio.

In the proposed FIP, however, EPA arbitrarily limits the types of CO<sub>2</sub> reducing technologies that could be used for achieving EPA's emission reduction goals. For example under the rate-based plan, EPA proposes to limit emission reduction credit ("ERC") eligible renewable energy sources to wind, solar, geothermal power, and hydropower as well as new and uprated nuclear power. 80 Fed. Reg. at 64,994. Likewise, in the mass-based plan, EPA proposes to limit eligibility for renewable energy set-aside allowances to on-shore utility scale wind, solar, geothermal power, or utility scale hydropower. *Id.* at 65,068. EPA offers no explanation to

justify these limitations on ERC generation and renewable energy set-asides under the rate-based and mass-based plans. If EPA maintains such limitations, it will frustrate the very flexibility that EPA has touted in promoting the Clean Power Plan. To ensure that there is maximum flexibility to implement the Clean Power Plan, EPA must ensure that any ERC program in a rate-based plan or allowance set-aside program in a mass-based plan must include, at a minimum, all of the CO<sub>2</sub> emission reduction technologies and energy sources included in the final Clean Power Plan.

Further, the limited scope of EPA's proposal for ERC generation and renewable energy set-asides will create confusion for states as they prepare their own implementation plans. On the one hand, EPA explicitly endorses a broad range of eligible CO<sub>2</sub> emission reduction technologies and sources of energy that can contribute to achievement of EPA's emission reduction goals in the Clean Power Plan and explicitly encourages states to include (or consider including) all of these emission reducing options in their implementation plans. However, EPA offers little guidance on how to ensure that such broadly inclusive plans will be approved. In contrast, EPA emphasizes in the proposed model trading rules that when states adopt provisions that mirror the model trading rule, those provisions will be presumptively approvable. *See, e.g.*, 80 Fed. Reg. at 64,969. By creating a presumption of approvability only for the limited subset of CO<sub>2</sub> emission reduction technologies included in the proposed model trading rules, EPA has created uncertainty for the additional technologies recognized as compliance options in the Clean Power Plan. As a result, states may be reticent to adopt broader ERC programs or allowance set-asides out of concern over the approvability of programs that are broader than EPA's proposed FIP. To avoid such confusion and promote the full suite of potential compliance options, EPA must issue guidance in the interim expressing its intent to expand the final FIP and model rules to broadly include, at a minimum, all CO<sub>2</sub> emission reduction technologies and energy sources included in the final Clean Power Plan. In addition, the FIP and model rules should provide consideration for yet unknown future technologies that may come into fruition over the Clean Power Plan's long regulatory timeline so that all emissions reductions are treated equally. Doing so will encourage states to promote a full range of projects that can reduce CO<sub>2</sub> emissions in their implementation plans.

Finally, in addition to indicating an intent to expand the scope of CO<sub>2</sub> emission reducing technologies and energy sources recognized in the final FIP and model trading rules, it is essential that EPA adopt uniform criteria under the rate-based and mass-based plans. At present, these two proposed plans include different criteria for inclusion that could have a substantial effect on implementation and achievement of EPA's emission reduction goals. For example, EPA has proposed a broader range of CO<sub>2</sub> reducing technologies that could be used for achieving EPA's emission reduction goals in the rate-based model trading rule than in the mass-based model trading rule. The proposed rate-based model trading rules list qualified biomass;<sup>3</sup> waste-to-energy (biogenic portion); nuclear energy; non-affected CHP units, including waste heat power; and demand-side energy efficiency or demand-side management measures that save electricity. 80 Fed. Reg. at 65,093-94 (proposed 40 C.F.R. § 62.16435(a)(4)). In contrast, the mass-based model rule limits eligible resources to "onshore utility scale wind, solar, geothermal

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<sup>3</sup> EPA must treat all renewables on a level playing field and thus recognize the inherent carbon neutrality of agricultural and forest biomass feedstocks for purposes of the model trading rules, the Clean Energy Incentive Program ("CEIP"), and any state-specific FIP. Similarly, biogenic emissions from such feedstocks should not be considered as regulated emissions under the Clean Power Plan when used as fuel at affected EGUs.

power, or utility scale hydropower” and excludes the CO<sub>2</sub> reducing technologies that are listed in the rate-based model rule. *Id.* at 65,068 (proposed 40 C.F.R. § 62.16245(a)(2)). EPA does not provide any further explanation to support this arbitrary and segregated treatment. Since these other CO<sub>2</sub> reducing technologies are eligible resources under the rate-based model rule, EPA should include these energy sources and technologies in the mass-based model rule.

In these comments, the Associations do not express a preference for a rate-based or mass-based approach. However, it is imperative that both EPA and the states evaluate and select between these two options on their merits, based on a level playing field and in the best interest of the state. Applying different eligibility criteria for CO<sub>2</sub> emission reduction technologies and energy sources that can contribute to achieving emission reduction goals could inadvertently favor one approach over another from an implementation standpoint. To ensure that choices between rate-based and mass-based plans are based on the merits, EPA must ensure that the rate-based and mass-based plans included in a federal plan or model trading rule include the same compliance options—with broad availability for all CO<sub>2</sub> reducing technologies, which include generation sources that reduce emissions, and energy sources—so that EPA and the states can choose an approach based on the relative costs and benefits of the plan and not on the types of available compliance options.

### **III. EPA Must Refrain from Prejudging How It Will Apply the Proposed FIP to States that Fail to Submit a Satisfactory Implementation Plan**

EPA should also maximize flexibility by avoiding premature decision making with respect to hypothetical future decisions on FIPs. While providing some guidance to states in the form of model rules can be beneficial, EPA has no legal obligation to make any final decisions with respect to FIPs at this time. Therefore, the Associations urge EPA to defer any final implementation decisions until after a legal obligation arises due to the failure of a state to submit a satisfactory implementation plan and, even at that point, must not apply a one-size fits all approach.

Under Section 111(d), states have the primary responsibility for implementing emissions guidelines. *See* 42 U.S.C. § 7411(d)(1). In contrast, EPA’s legal obligation to issue a federal plan does not arise unless a “State fails to submit a satisfactory plan” *Id.* 7411(d)(2)(A). In the Clean Power Plan, EPA established a September 6, 2016 deadline for states to submit implementation plans. 80 Fed. Reg. at 64,669. (That deadline can be extended for two additional years. *Id.*) Thus, at the earliest, EPA will not have an obligation to even propose a FIP for a deficient state plan until after September 6, 2016. There is no reason for EPA to prematurely reduce its own regulatory flexibility by locking itself into certain regulatory approaches at this time.<sup>4</sup> Instead, EPA can best respond to any states that fail to submit satisfactory implementation plans by deferring any final decisions until a FIP becomes necessary.

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<sup>4</sup> To the extent that EPA believes that states would benefit from guidance as they prepare their own SIPs, it can do so through non-binding guidance rather than establishing a final FIP that would be applied in the event that a state’s implementation plan is insufficient.

Specifically, the Associations urge EPA to defer making a final decision with respect to a mass-based or rate-based plan until the time it may become necessary for EPA to adopt a FIP. The relative merits of each approach may vary on a state-by-state basis and EPA cannot fully evaluate each option until after it knows the specific state to which a FIP would apply. Further, choosing between a rate-based and mass-based plan now could unduly influence the states' decisions as they evaluate the merits of each approach. Given the states' primary role in implementation, EPA should not interfere with states' decision-making process by expressing a preferred option before the states submit their initial implementation plans. Further, EPA must defer deciding whether a uniform FIP should be applied to each state that fails to submit a satisfactory implementation plan. EPA cannot effectively decide in advance that it would apply a one-size-fits-all approach for each state where a FIP becomes necessary. Instead, under such a scenario, EPA must evaluate each state individually after accepting public input and determine the FIP that best meets that state's needs. EPA cannot prejudice any such outcome at this time. Thus, while there may be some benefits to uniformity, any final decision must wait until after state plans have been submitted and EPA can determine the states for which a FIP is required.

Delaying any final decision with respect to a FIP until after the states' initial submission deadline has an added advantage of allowing EPA to learn from the compliance approaches adopted by the states. The Clean Power Plan repeatedly touts EPA's intended flexibility that states should have in developing implementation plans. Relying on this flexibility with respect to compliance, states may develop novel compliance options that were not previously considered by EPA. To maximize the efficiency and minimize the costs of any FIP, EPA must first give itself the flexibility to learn from the states and adopt, as appropriate, compliance mechanisms that the states have developed to achieve EPA's emission reduction goals. This can only be achieved by delaying any final decisions until a FIP becomes necessary.

At the same time, for the reasons discussed above, the existence of the overly narrow proposed FIP has the potential to influence states to limit options in the implementation plans they are developing. Thus, we request EPA issue interim guidance that signals to the states EPA's endorsement of greater flexibility and options than that proposed in the FIP itself. While EPA should not proceed to finalize the FIP at this time, it should affirm to the states in the near term that the narrowly circumscribed proposal does not limit state options and flexibility.

#### **IV. EPA Must Include a Reliability Safety Valve in any Federal Plans**

Given the dramatic changes in electricity generation envisioned by EPA in the Clean Power Plan, many commenters expressed concern over the impacts that the Clean Power Plan could have on grid reliability. In the final Clean Power Plan, EPA made a number of changes to address concerns over grid reliability. For example, EPA delayed the start of the initial compliance period by two years, until 2022, to give states and affected EGUs more time to identify, site, and install the infrastructure needed to comply with EPA's emission reduction goals. In addition, EPA included a Reliability Safety Valve ("RSV") that would be triggered in emergency situations where compliance with the Clean Power Plan could jeopardize grid reliability. *See* 80 Fed. Reg. at 64,877-79.

Although EPA included the RSV in the Clean Power Plan as a means of ensuring grid reliability, EPA fails to include the RSV in the proposed FIP and model rules. This is both

unreasonable and inconsistent with the flexibility that EPA touts in the final Clean Power Plan. As a result, the same reliability concerns expressed in comments on the proposed Clean Power Plan remain relevant. For example, if states obtain an extension for submitting their implementation plans, submissions will not be made until September 6, 2018, and EPA will have until September 6, 2019 to approve the implementation plans.<sup>5</sup> This would leave states and affected EGUs with less than three years to implement changes before the first interim compliance period begins. They will have even less time if EPA disapproves an implementation plan and is then required to prepare a FIP. As Federal Energy Regulatory Commission (“FERC”) Commissioner Tony Clark recently explained in testimony before the U.S. House of Representatives Committee on Energy and Commerce, major pipeline and transmission projects can take from three to twelve years to complete.<sup>6</sup> Existing infrastructure, capacity, and resources that will dictate new infrastructure needs vary by region, as does geography and other permitting challenges. Thus, there is a risk that some infrastructure projects that may be needed to comply with the Clean Power Plan will not be completed before the initial compliance date in 2022. Without an RSV, grid reliability may be jeopardized while such projects are under way. For these reasons, we urge EPA to include an RSV in both the FIP and model rules to ensure that grid reliability will be maintained.

#### **V. EPA Must Revise the Proposed FIP and Model Rules to Fully Account for the CO<sub>2</sub> Reduction Benefits of Combined Heat and Power**

In the final Clean Power Plan, EPA appropriately recognized the CO<sub>2</sub> reduction benefits of CHP units and explicitly stated that non-affected CHP units can generate ERCs under a rate-based plan. 80 Fed. Reg. 64,950. EPA also recognizes the need to provide technical assistance to help states incorporate CHP in their implementation plans. *Id.* at 64,902. The proposed rate-based model rule includes an accounting method for calculating the ERCs for non-affected CHP units that would be presumptively approvable if included in a state plan. *Id.* at 64,966. However, EPA’s approach in the proposed model rule significantly undervalues CHP’s CO<sub>2</sub> emission reduction benefits.

In the final Clean Power Plan, EPA asserts that an accounting approach for generating ERCs at CHP units must both “take into account the fact that a non-affected CHP unit is a fossil fuel-fired emission source, as well as the fact that the incremental CO<sub>2</sub> emissions related to electrical generation from a non-affected CHP unit are typically very low.” 80 Fed. Reg. at 64,902. The Associations agree that it is appropriate to set out the incremental emissions associated with CHP units before assigning ERCs to the electricity output. Such an approach to calculating CHP benefits is an example of the avoided emissions approach where electricity produced by CHP displaces another, more carbon intensive energy source. However, EPA’s

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<sup>5</sup> In many cases, extensions of the submission deadline for state plans will be critical to ensuring that the states can prepare effective plans that will meet EPA’s emissions reduction goals in a least-cost manner. Thus, the Associations urge EPA to take a deferential view when considering extension requests and freely grant extensions to states that need additional time to prepare plans.

<sup>6</sup> Written Testimony of Tony Clark, Commissioner, Federal Energy Regulatory Commission, before the U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Energy and Power at 6 (Dec. 1, 2015), available at <https://www.ferc.gov/CalendarFiles/20151201095914-Clark-12-01-2015.pdf>.

proposed methodology is flawed. First, it is not based on actual emissions data but rather assumes that CHP output always displaces natural gas generation. *Id.* n.30. Second, it compares the CHP output to future emission target rates, rather than the real-time emission rates that are actually displaced. *Id.*

It is not appropriate to base the netting of the electrical output from a biomass or natural gas CHP system on the compliance goals for natural gas combined cycle turbines. Instead, EPA should compare the emissions from the non-affected EGUs to actual emissions data from the relevant affected EGUs from the previous calendar year. The Associations have identified three alternative approaches that are available to EPA and would establish a reference rate that more accurately accounts for the actual emission reductions attributable to CHP and thereby increases the number of ERCs that would be generated by CHP units over EPA's proposed approach. EPA could give states the option of using one of the first two approaches below, or suggest that all states use the third approach:<sup>7</sup>

1. Use the average affected EGU emission rate for EPA's Emissions & Generation Resource Integrated Database ("eGRID") subregion in which the CHP project is located;
2. Use the average affected EGU emission rate for each state; or
3. Use a uniform national reference emission rate based on all affected EGUs.

There are three benefits to using one of these options. First, using any of these reference rates would allow the calculated ERCs to reflect the actual emissions savings generated by a CHP unit, either on a sub-regional, state or national basis. Second, the EGU emission rates would also be consistent with the approach recommended by the EPA CHP Partnership for calculating avoided CO<sub>2</sub> emissions from CHP.<sup>8</sup> Third, these reference rates provide CHP projects with incentives commensurate with actual emissions benefits and thereby ensure a level playing field with other CO<sub>2</sub> reducing alternatives.

In addition to the changes to the method for estimating the emissions benefits of CHP, EPA must clarify how avoided line losses are included in the calculation of ERCs for all non-affected CHP units. The proposed model rule states that only CHP units smaller than 1 MW can include line losses in the calculation of ERCs. 80 Fed. Reg. at 65,072. However, most industrial CHP units greatly exceed this 1 MW threshold and invariably displace a significant portion of the load otherwise served by a local utility, independent system operator ("ISO") or regional transmission organization ("RTO"), and delivered by the local transmission provider. The fact that this results in significant avoided line losses at transmission voltages should be obvious and therefore given full recognition in the calculation of ERCs. Therefore EPA must eliminate any output-based limits for incorporating line losses into ERC calculations.

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<sup>7</sup> See Comments filed by the Alliance for Industrial Efficiency for greater details on these three proposals.

<sup>8</sup> Combined Heat and Power Partnership, Fuel and Carbon Dioxide Emissions Savings Calculation Methodology for Combined Heat and Power Systems, February 2015.

## **VI. EPA Must Ensure that Trade-Exposed Industries Are Not Unduly Impacted by a FIP**

As the states and EPA develop implementation plans, they must also take into account the impact of their plans on trade exposed industrial sectors. Implementation of the Clean Power Plan's emission reduction goals threatens to have a significant impact on energy intensive industries that face stiff overseas competition and may be disadvantaged by increased energy prices and reduced reliability. Implementation plans that place an undue burden on such industries through increased energy prices or other direct or indirect effects could thwart EPA's emission reduction goals by simply shifting production and emissions to overseas competitors. As a result, such plans would not produce a net reduction in emissions due to international leakage. Thus, EPA and the states must ensure that any adverse effects on trade exposed industries are mitigated.

While the Clean Power Plan is focused on existing fossil fuel-fired EGUs, its impacts will be felt far beyond that sector. Industrial sectors are impacted by a broad range of factors, including industry economics, geography, federal and state incentives, transportation networks, ownership structures, foreign competitors, profit margins, and customer bases. However, for some industrial sectors energy use is the single largest operational cost and for many manufacturing operations, energy costs are second only to raw materials. Moreover, many domestic manufacturing sectors face heightened global competition. As a result, these industries already have a strong incentive to reduce energy use and become as efficient as possible. At the same time, however, significant increases in energy costs due to higher electricity prices can threaten the competitive balance in certain industries and create a risk that domestic production will be replaced by increased production abroad.

Any implementation plan that produces such a shift in production will also produce international leakage of CO<sub>2</sub> emissions and thwart EPA's ultimate goal of reducing GHG emissions. Reducing domestic industrial activity is by no means an effective way of achieving EPA's goals of reducing net GHG emissions. Instead, increasing energy prices to the point of tipping the competitive balance for domestic industrial sectors will simply shift the location where emissions occur and will have no effect on net GHG emissions. As long as global demand for industrial products does not change, that demand will simply be met by production in locations that face fewer regulatory costs and utilize energy less efficiently than in the United States, resulting in as many—if not more—GHG emissions on a global scale. GHG emissions could also increase due to the use of more carbon-intensive energy sources and increased transportation-related emissions. To put it simply, driving industrial production abroad is not a sound strategy for reducing GHG emissions. Thus, the Associations urge EPA and the states to carefully consider the impacts that their implementation plans will have on domestic industrial sectors and ensure such burdens are manageable and will not result in international leakage of CO<sub>2</sub> emissions.

## **VII. EPA Must Ensure that the Regulated Community Has Sufficient Time to Implement Any Final Rule Issued by EPA**

As EPA and the states prepare implementation plans for the Clean Power Plan, it is essential that they provide sufficient lead time for regulated entities to implement the necessary

programs to meet EPA's emission reduction goals consistent with the state plans. In particular, EPA must ensure that there is sufficient time to resolve any post-rulemaking litigation before implementation deadlines arise. Thus, EPA must ensure compliance with its own self-imposed deadlines for reviewing state submissions and, if necessary, preparing FIPs. If EPA were to miss these deadlines it would further compress the already limited timeframe for implementation and jeopardize states' ability to achieve the Clean Power Plan's emission reduction goals. As an initial matter, EPA must continue to defer to the states with respect to implementation of the Clean Power Plan. Section 111(d), and the Clean Air Act in general, give states the central and preeminent role in devising plans to implement the Clean Air Act's emissions limitations. Consistent with that approach, EPA must give the states maximum flexibility to prepare their own plans that will achieve EPA's emission reduction goals. This is particularly true for implementation decisions that can limit the economic impact of the Clean Power Plan. Thus, EPA must develop a flexible and open-minded approach to evaluating the states' implementation plans to ensure that each state can develop an efficient and least-cost state-specific approach that is not unduly influenced by EPA's own regulatory programs.

In addition, as EPA considers the states' implementation plan submissions and, if necessary, prepares state-specific FIPs, it must ensure that there is sufficient time after EPA's final rulemaking action for states and regulated entities to implement those plans before implementation deadlines arise. State-specific implementation plans, like the Clean Power Plan itself and EPA's proposed FIP, are likely to entail complex regulations that will require significant and expensive changes for both regulators and the regulated community. It is essential that those impacted parties are given sufficient lead time after final EPA action to successfully implement such programs. In the Clean Power Plan, EPA established a one-year deadline for issuing decisions on implementation plans submitted by the states. *See* 80 Fed. Reg. at 65,038 (citing 40 C.F.R. § 60.5715). Further, EPA is proposing a one-year deadline to issue a FIP after a state plan is disapproved. Thus, assuming that a state obtains a two-year extension to submit an implementation plan, the plan approval deadline would be September 2019, while any necessary FIPs would not be issued until September 2020. In either case, there will be a very short window of time for implementation after a state or federal plan is officially approved by EPA.

Thus, without sufficient lead time, states, regulated entities, and large industrial energy users would likely have to begin taking action to implement the Clean Power Plan without knowing with any certainty the final content of their implementation plan. Moreover, EPA's final actions with respect to state-specific implementation plans could also be subject to litigation and judicial review for several years. Thus, EPA must factor litigation into account when evaluating rulemaking timelines and ensure that any expected litigation will be concluded far enough in advance of any compliance deadlines that states and regulated entities will not be forced to begin implementation of programs that may ultimately prove to be different than what might be required after any judicial review. Given the already short window for implementation and the risk of litigation after approval of a final plan, it is imperative that EPA meet the deadlines it has imposed on itself to review state submissions and, if necessary, prepare a FIP. Failure to meet these deadlines will further limit the time available to implement the final plans and jeopardize the states' ability to meet the interim compliance goals. Further, if EPA is unable to meet its self-imposed deadlines, it must create a mechanism to defer applicability of the Clean Power Plan, including the extension of relevant deadlines, so that when approval of a state's plan

is delayed by EPA the state and affected EGUs will still have sufficient time for implementation before the compliance period begins.

### **VIII. The Associations Support EPA's Proposed Revisions to 40 C.F.R. Part 60 that Seek to Provide Additional Flexibility to States**

In addition to proposing a FIP and model trading rules to implement the Clean Power Plan, EPA has proposed a number of substantive amendments to 40 C.F.R. Part 60 that would apply to any and all regulations issued under Section 111(d). EPA asserts that these provisions will clarify EPA's obligations under Section 111(d) and provide additional flexibility for EPA and the states that will reduce the regulatory burdens that Section 111(d) regulations can impose. Specifically, these proposed amendments will:

- Authorize EPA to issue partial approvals of state implementation plans under Section 111(d) that are similar to EPA's authority under Section 110. *See* 80 Fed. Reg. at 65,060.
- Authorize EPA to issue conditional approvals of state implementation plans under Section 111(d) that are similar to EPA's authority under Section 110. *Id.*
- Authorize EPA to issue calls for revisions of state implementation plans under Section 111(d) that are similar to EPA's authority under Section 110. *Id.*
- Authorize EPA to make error corrections to state implementation plans that allow EPA to correct erroneous approval, disapproval, or promulgation of implementation plans without requiring additional state submissions. *Id.*
- Provide specific completeness criteria and a process that EPA can use to determine whether state implementation plans are administratively complete before EPA begins its substantive review of state implementation plans. *Id.* at 65,059.
- Revise EPA's deadline to make final determinations regarding state implementation plans under Section 111(d) by establishing a uniform 12-month review period for all state plans submitted under Section 111(d). *Id.*

As described above, Section 111(d) is intended to give states the primary role in implementing emissions limitations on existing sources. Therefore, EPA must give deference to state choices and adopt a flexible approach to approving the implementation plans submitted by the states. The Associations support the proposed revisions to 40 C.F.R. Part 60 to the extent that they promote state primacy and flexibility and seek to formalize those ideals for the Clean Power Plan and all emissions guidelines imposed under Section 111(d).

## **IX. EPA Must Revise the Scope of the Clean Energy Incentive Program By Providing Additional Flexibility in Complying with the Clean Power Plan’s Emission Reduction Goals**

One of the most significant new issues presented in the final Clean Power Plan was the inclusion of the CEIP, which is intended by EPA to encourage early investment in certain renewable energy and energy efficiency programs in advance of the Clean Power Plan’s initial 2022 compliance date. Because the CEIP was not included as part of the proposed Clean Power Plan, EPA established a separate 41-day comment period for the CEIP and has encouraged further comments on the CEIP in response to the proposed FIP. As a general matter, to the extent the Clean Power Plan is implemented as currently contemplated in the final rule, the Associations note the critical importance for flexibility in compliance mechanisms, including recognition of early action. Such concepts can provide additional flexibility with respect to achieving the emission reduction goals in the Clean Power Plan. Given the strict compliance deadlines and aggressive emission reduction goals that EPA has imposed, EPA should promote flexibility in compliance to the fullest extent possible.<sup>9</sup>

At the outset, EPA did not propose an early action incentive program in the proposed Clean Power Plan and, therefore, the CEIP is not a logical outgrowth of the proposed Clean Power Plan. *See, e.g., Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (“Something is not a logical outgrowth of nothing.”).<sup>10</sup> EPA cannot cure this error with a brief, after-the-fact comment period. Instead, EPA should eliminate the CEIP at this time and, to the extent it believes such a program is necessary, EPA should begin a new proceeding that complies fully with the Clean Air Act’s rulemaking requirements. Leaving the CEIP in place while EPA evaluates comments and considers potential changes severely prejudices the states, affected EGUs, and other entities due to the remaining uncertainty about the scope of the CEIP and how it can be incorporated into the states’ implementation plans. Initial deadlines for state submissions are due in less than nine months, and EPA has offered no timeline for reviewing and responding to comments on the CEIP. For the same reasons, the Associations cannot effectively comment on the inclusion of the CEIP in a FIP without knowing how, if at all, the CEIP may change.

To avoid uncertainty, confusion, and prejudice, EPA must withdraw the CEIP and proceed, if at all, through a separate rulemaking. The Associations are particularly concerned about the piecemeal approach EPA appears to be taking with respect to the CEIP. EPA recently

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<sup>9</sup> As discussed above, the Associations strongly object to any effort to set standards or impose requirements that cannot be achieved by the source itself. Thus, some of the Associations are involved in litigation to challenge EPA’s authority under Section 111(d) of the Clean Air Act to, among other things, set performance standards based on EPA’s “building blocks” methodology, which includes: “(1) on-site efficiency improvements by fossil fuel-fired generating units, (2) shifting electricity generation from coal-fired units to lower-emitting gas-fired units; and (3) shifting generation from both coal- and gas-fired units to new renewable energy sources.” *See, e.g., Chamber of Commerce, et al., Motion for Stay of EPA’s Final Rule*, October 23, 2015 at 4. While the Associations support additional flexibility for compliance mechanisms to the extent EPA implements the Clean Power Plan and the Court does not intervene in the interim, such mechanisms must be purely voluntary and cannot be relied upon in setting emissions standards.

<sup>10</sup> The Associations reserve the right to seek judicial review of and action on EPA’s failure to follow statutory procedures when adopting the CEIP.

announced that it would issue a new “action that outlines aspects of the CEIP that were not finalized in the Clean Power Plan, including addressing how the program would be implemented.” EPA, CEIP Future Notice and Comment Opportunity (January 2016).<sup>11</sup> EPA also announced it would submit a proposal of the new action for public review and comment. *Id.* At the same time, EPA announced it would continue to accept comment on aspects of the CEIP included in the Clean Power Plan but was under no obligation to respond to those comments. By addressing the CEIP in a piecemeal fashion through multiple rulemakings and in many cases with incomplete notice and comment opportunities, EPA is depriving the Associations and other interested stakeholders of their procedural rights under the Clean Air Act and Administrative Procedure Act to meaningfully participate in shaping EPA regulations. By segmenting CEIP comments into multiple pieces, EPA is obscuring a full understanding of the CEIP and how it will operate, creating unnecessary confusion and depriving the Associations of an opportunity to submit informed comments. In particular, the Associations are concerned with EPA’s position that it can accept comments on the CEIP without any obligation to respond to those comments in any way. Because the CEIP carries regulatory ramifications for implementation of the Clean Power Plan, EPA is required to advance the CEIP through a full notice and comment rulemaking process. Thus, EPA should withdraw the CEIP entirely and begin with a wholly new rulemaking. However, at a minimum, if EPA decides to take on significant legal risk by not proceeding with a new rulemaking action, it still must expressly reopen the entire CEIP for comment so that the Associations can prepare informed comments on both the CEIP’s structure as explained in the Clean Power Plan and on any additional implementation issues including in EPA’s forthcoming proposal.

Further, to the extent that EPA moves forward with the CEIP, the Associations offer certain suggestions regarding the program, as outlined below.

#### **A. EPA Should Provide Additional Flexibility for Early Action**

EPA’s stated goal of using an early action incentive program to reduce costs for meeting the Clean Power Plan’s aggressive targets would be better achieved by allowing for more flexibility in the types of projects that can qualify for the CEIP. As EPA explains in the Clean Power Plan:

[T]he overall cost of achievement of the emission performance rates or state goals could be reduced by an approach that granted some form of beneficial recognition to emission reduction investments that both occur and yield reductions prior to the first date on which the program of the interim plan performance period.

80 Fed. Reg. at 64,831. EPA goes on to assert that an early incentive program could (1) reduce energy bills through early application of energy saving technologies, (2) accelerate the rate at which costs of energy efficiency and renewable energy technologies will fall during the interim compliance period, and (3) provide additional emission reduction resources to aid in achieving state plan obligations. *Id.* at 64,832.

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<sup>11</sup> Available at <http://www.epa.gov/cleanpowerplan/ceip-future-notice-and-comment-opportunity-january-2016>.

If properly designed and implemented, an early action incentive program has the potential to provide important benefits for complying with the Clean Power Plan, both by promoting the development of technologies that can reduce net GHG emissions and by providing early reductions in GHG emissions that can be banked for compliance at a later date. At the same time, however, it is imperative that any early action incentive program avoid unnecessary distinctions between the many CO<sub>2</sub> reducing technologies and sources of energy that are available to comply with the Clean Power Plan and allow market forces [and state-driven policy choices] to dictate the types of programs that should be used in each state to comply with the Clean Power Plan's emission reduction goals. Any program that picks winners and losers by limiting access to compliance incentives would be inconsistent with EPA's stated goal of providing maximum flexibility to the states and realizing GHG reductions from a diverse group of programs. Thus, while the Associations support the concept of increased flexibility and allowance of early action to be recognized in the event that ultimate compliance with the Clean Power Plan is necessary, significant changes are needed to the CEIP to expand the scope of the program to increase accessibility for all CO<sub>2</sub> reducing technologies and sources of energy.

### **B. EPA Must Not Restrict Technologies and Sources of Energy in the CEIP**

In its current form, the CEIP fails to provide states with sufficient flexibility because it only applies to facilities that “[g]enerate metered MWh from any type of wind or solar resources.” *Id.* at 64,830. By limiting the CEIP to a few sources of energy, EPA creates an arbitrary and capricious division among energy sources and technologies that could reduce CO<sub>2</sub> emissions and be used for Clean Power Plan compliance. Moreover, contrary to the requirements for establishing BSER, EPA has failed to conduct any cost-benefit analysis whatsoever to show that these CEIP-eligible options would be the least costly among all technologies. The goal of the CEIP and Clean Power Plan implementation plans generally should be to promote efficient, least-cost, and flexible approaches to achieving EPA's emission reduction goals without imposing other externalities and impacts on the power delivery system such as lower reliability. Thus, rather than limiting early action incentives to some technologies and energy sources, while excluding others, EPA must create a level playing field by making the CEIP available to all technologies and energy sources that can reduce net GHG emissions from the electricity sector, including, but not limited to other forms of renewable energy identified in the Clean Power Plan, energy efficiency measures, and other forms of electricity generation that can help achieve compliance with state emission reduction goals, such as natural gas, CHP, biomass, and waste heat power. Such an approach would help ensure that states have maximum flexibility to design implementation plans that are best suited to their own economic, energy, and environmental conditions.

Further, EPA's proffered justifications for limiting the scope of the CEIP do not withstand scrutiny. First, EPA asserts that such a limitation is necessary to avoid a “shift [in] investment from RE to natural gas.” *Id.* at 64,831. Selecting certain energy sources for compliance with its environmental regulations, while excluding others, goes far beyond EPA's statutory authority. Second, EPA asserts the CEIP will reduce the costs of technology for wind and solar energy. *Id.* Again, EPA offers no reason why it should choose to seek to reduce the costs of wind and solar energy, but not other technologies that also offer emission reduction benefits. Third, EPA asserts that the program should be limited to wind and solar because they have shorter lead times than “other CO<sub>2</sub> reducing technologies.” *Id.* But even if EPA is correct,

it has no basis for excluding those other technologies. In fact, U.S. Energy Information Administration (“EIA”) has found that several types of energy sources have similar lead times to wind and solar energy.<sup>12</sup> Therefore, EPA should make the CEIP broadly applicable to all CO<sub>2</sub> reducing technologies and energy types, and let market conditions dictate the types of technologies that can be deployed to provide net emission reductions prior to the start of the compliance period for the Clean Power Plan.

Thus, to provide more flexibility to states and to ensure that emissions reductions are achieved in an efficient and cost-effective manner, EPA must expand the CEIP to include all CO<sub>2</sub>-reducing technologies and energy types.

## CONCLUSION

For the reasons described above, and subject to the caveats aforementioned, it is essential that EPA give the states the primary role in implementing the Clean Power Plan and ensure that any guidance or state-specific FIPs be developed with maximum flexibility to allow states and regulated entities to achieve emissions reductions in an efficient and cost effective manner. The Associations are standing by to answer any questions that EPA may have about implementing specific provisions in the proposed FIP or in evaluating the impact that a state-specific FIP may have in industrial and manufacturing sectors.

Respectfully submitted,

**National Association of Manufacturers**

**U.S. Chamber of Commerce**

**Aluminum Association**

**American Chemistry Council**

**American Forest and Paper Association**

**American Fuel and Petrochemical  
Manufacturers**

**American Petroleum Institute**

**American Wood Council**

**Brick Industry Association**

**Corn Refiners Association**

**Council of Industrial Boiler Owners**

**Electricity Consumers Resource Council**

**The Fertilizer Institute**

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<sup>12</sup> For example, conventional combustion turbines, advanced combustion turbines, and distributed generation (peak) have the same lead time as photovoltaics. EIA, Annual Energy Outlook 2015 Table 8.2. Likewise, conventional gas/oil combined cycle, advanced gas/oil combined cycle, fuel cells, distributed generation (base), conventional municipal solid waste, and solar thermal have the same lead time as onshore wind. *Id.*

## Appendix A

The **National Association of Manufacturers** (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **U.S. Chamber of Commerce** (the “Chamber”) is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America’s free enterprise system.

The **Aluminum Association** based in Arlington, VA, represents over 100 US and foreign-based companies that are primary producers of aluminum, aluminum recyclers, and producers of fabricated aluminum products, as well as industry suppliers.

The **American Chemistry Council** (“ACC”) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an \$812 billion enterprise and a key element of the nation's economy.

The **American Forest & Paper Association** (“AF&PA”) is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing gross domestic product. The industry makes products essential for everyday life from renewable and recyclable resources, producing about \$210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately \$50 billion.

The **American Fuel & Petrochemical Manufacturers** (“AFPM”) (formerly known as NPRA, the National Petrochemical & Refiners Association) is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM’s members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Petroleum Institute** (“API”) represents over 590 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The **American Wood Council** (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs approximately 400,000 men and women in family-wage jobs.

The **Brick Industry Association** (“BIA”), founded in 1934, is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states.

The **Corn Refiners Association** (“CRA”) is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Council of Industrial Boiler Owners** (“CIBO”) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

The **Electricity Consumers Resource Council** (“ELCON”) is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of industrial commodities and consumer goods from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities in all regions of the United States. Many ELCON members also cogenerate electricity as a by-product to serving a manufacturing steam requirement.

The **Fertilizer Institute** (“TFI”) represents the nation’s fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI’s members provide nutrients that nourish the nation’s crops, helping to ensure a stable and reliable food supply.